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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. [redacted] 207

L. C. FULLER, JR., LUMBER CO., INC.,
Petitioner,
vs.
CHESTER HERMAN ANGLIN,
Respondent.

L. C. FULLER, JR., LUMBER CO., INC.,
Petitioner,
vs.
MRS. GRACE ROBBINS, Administratrix of the Estate of Bailey Robbins, Deceased,
Respondent.

L. C. FULLER, JR., LUMBER CO., INC.,
Petitioner,
vs.
G. C. MILLIGAN and JOHN T. RIDGEWAY, D/B/A MILLIGAN & RIDGEWAY FUNERAL HOME,
Respondent.

## BRIEF OF RESPONDENTS

In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 1106.

L. C. FULLER, JR., LUMBER CO., INC.,
Petitioner,
vs.
CHESTER HERMAN ANGLIN,
Respondent.

L. C. FULLER, JR., LUMBER CO., INC.,
Petitioner,
vs.
MRS. GRACE ROBBINS, Administratrix of the Estate of Bailey Robbins, Deceased,
Respondent.

L. C. FULLER, JR., LUMBER CO., INC.,
Petitioner,
vs.
G. C. MILLIGAN and JOHN T. RIDGEWAY, D/B/A MILLIGAN & RIDGEWAY FUNERAL HOME,
Respondent.

## BRIEF OF RESPONDENTS

**In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.**

MAY IT PLEASE THE COURT:

Petitioner, the L. C. Fuller, Jr., Lumber Co., Inc., seeks the issuance of a writ of certiorari to review a judgment entered by the United States Court of Appeals for the Sixth Circuit, which judgment sustained the judgments of the United States District Court for the Middle District of Tennessee entered on jury verdicts in two personal injury suits and one property damage suit, all growing out of a motor vehicle accident. In affirming the judgments of the lower court, the United States Court of Appeals for the

Sixth Circuit affirmed the trial court's exercise of discretion in refusing to transfer the said three suits from the United States District Court in Tennessee (the State where all of the plaintiffs resided) to the District Court in Indiana. It is the action of the Court of Appeals for the Sixth Circuit, in affirming the said exercise of discretion by the trial court in refusing to transfer said cases pursuant to **Title 28, U. S. C. A., Section 1404 (a)**, that is sought to be reviewed by the petition in this matter.

## OPINION BELOW.

There was no written opinion in the Court of Appeals for the Sixth Circuit. The judgment and order of the Court of Appeals for the Sixth Circuit is found in the Appendix attached to the petition for writ of certiorari filed by defendant. The trial court's statement and opinion, in declining to transfer these three cases from the State of the plaintiffs' residence to the State of Indiana, is found in Appellant's Appendix below at pages 62a, 63a, 64a and 65a.

## JURISDICTION OF THIS COURT.

Petitioner seeks to invoke the jurisdiction of this Court under **Title 28, U. S. C. A., Section 1254 (1)** and **Rule 19 (b)** of the Rules of this Court, on the purported grounds that the decision of the Court of Appeals for the Sixth Circuit conflicts with the decisions of the Court of Appeals for the Seventh Circuit and the Fourth Circuit, and on the further ground that the decision of the Court of Appeals for the Sixth Circuit in these causes is in conflict with applicable decisions of this Court. **Norwood v. Kirkpatrick** (1955), 349 U. S. 29, 99 L. Ed. 789, and **Gulf Oil Corporation v. Gilbert** (1947), 330 U. S. 501, 508, 91 L. Ed. 1055.

It is respectfully submitted that the question presented by Appellant's petition merely relates to a matter of the

exercise of discretion by the trial court and the affirmance of that exercise of discretion by the Court of Appeals for the Sixth Circuit, that the issues in the case *sub judice* are not similar to the facts involved in the decision of the Court of Appeals for the Seventh Circuit (**Chicago, Rock Island and Pacific Railroad Co. v. Igoe** [1955, 7th Cir.], 220 Fed. [2] 299, 304), or the decision of the Court of Appeals for the Fourth Circuit (**Southern Railway Company v. Madden** [1956, 4th Cir.], 235 Fed. [2] 198), and that the facts in the cases *sub judice* are not at all similar or in conflict with the decision of the Supreme Court in the cases cited hereinabove. Questions involving an exercise of discretion on the facts involved depend upon the facts in each particular case, and the ultimate ruling on that point, involving the exercise of discretion, can rarely, if ever, be dignified as constituting a decision on a question of law in conflict with other applicable or similar decisions.

## STATEMENT OF THE CASE.

The plaintiff, Chester Herman Anglin (Civil Action No. 2010), is a citizen of the State of Tennessee and a resident of Dover, Tennessee (Appellant's App. below, p. 12a). The plaintiff, Mrs. Grace Robbins (Civil Action No. 2011), is a citizen of the State of Tennessee and a resident of Paris, Henry County, Tennessee (Appellant's App. below, p. 55a). The plaintiffs, C. C. Milligan and John T. Ridgeway (Civil Action No. 2012), are residents of Paris, Henry County, Tennessee.

The only two surviving eyewitnesses to the accident were the plaintiff, Chester Herman Anglin, a resident of Tennessee, and Earl Campbell, who resided in Haleyville, Alabama (Appellant's App. below, p. 52a).

The plaintiff's doctor, who treated Anglin upon his return from Indiana, was a resident of Tennessee (Appellant's App. below, p. 52a).

The affidavits filed in opposition to the defendant's motion to transfer these cases to Indiana further pointed out that the witnesses who would testify to establish the ownership of the combination hearse-ambulance which was destroyed in the accident and the extent of the damage thereto, were residents of Tennessee (Appellant's App. below, p. 53a).

The defendant, L. C. Fuller, Jr., Lumber Company, was an Alabama corporation, and was duly qualified to do business in the State of Tennessee and had a duly appointed agent for the service of process in Nashville, Davidson County, Tennessee (Appellant's App. below, p. 54a).

In addition to the above residents of Tennessee, who were named as witnesses in the affidavits filed in opposition to the defendant's motion, there were a substantial

additional number of residents of Tennessee who did, in actuality, testify at the trial.

In the affidavit filed by the defendant's counsel, in support of defendant's motion to have the cases transferred to the Indiana District, while it is averred that sixteen witnesses that would testify in the case, all lived in Indiana, the names of these witnesses were not listed and it was not stated in said affidavit what the substance of their proposed testimony would be or wherein same would be material (Appellant's App. below, pp. 33a, 37a, and 41a). The trial court, after hearing extended argument on defendant's motion, denied said motion to transfer the case to the Indiana District Court, and stated his reasons in some detail for such denial:

"* * * *

"That right to select the forum of the trial is deemed to be a very important right and one which should not be interfered with in the absence of strong and compelling reasons.

* * * * * * * *

"The inference is rather strong from the affidavits and from the record as a whole that at least a considerable number of these 16 witnesses would be cumulative. Possibly a good number of them would be witnesses to the scene of the accident and the conditions which obtained at the scene of the accident after the accident occurred, although possibly some few of them might know something about the operation of the vehicle sometime prior to the occurrence.

* * * * * * *

**"On the whole, it appears to the Court that balancing the factor of the number of witnesses involved, the witnesses from Indiana and the witnesses from Tennessee, that probably the matter is substan-**

tially equal, the inconvenience would be substantially equal; * * *"

* * * * * * *

"So on the whole case, balancing all the factors involved and considering all of them, the Court feels that there has not been a sufficient showing made to cause the Court to exercise its discretion to transfer the case from this court to the federal court in Indiana. That being true, the Court will have to deny the application." (Appellant's App. below, pp. 62a, 63a and 65a).

## ARGUMENT.

The statute invoked by the defendant **[Title 28 USCA, Section 1404 (a)]** merely provides that the District Court "may transfer any civil action" for the convenience of the parties and witnesses.

Certainly the right of a plaintiff to choose his forum is a substantial right. **Sun Oil Co. v. Lederle et al.**, 199 F. 2d 423 (CCA 6).

The venue privilege of a plaintiff is a very substantial factor which is to be given consideration and weight in balancing the conveniences between the parties. **Duffy v. U. S.** (District Court, New York), 114 F. Supp. 881. See also, **International Union of Electrical, Radio & Machine Workers, CIO, et al. v. United Electrical, Radio and Machine Workers of America et al.**, 192 F. 2d 847; **Robbins Music Corp. et al. v. Alamo Music, Inc., et al.** (District Court of New York), 119 F. Supp. 29; and **Strypek v. Schreyer et al.** (District Court of New York), 118 F. Supp. 918.

**This is particularly true when the forum selected by the plaintiffs is the State in which they reside.**

**Section 1404 (a)** confides to the District Court a wide discretion, and Appellate Courts will not make a *de novo* decision on the subject or substitute its discretion for that of the trial judge. **Schoen v. Mountain Producers Corp.** (CCA 3), 170 F. 2d 707.

The trial judge's exercise of discretion with respect to these motions to transfer will not be disturbed by the appellate courts "except for a clear abuse of discretion." **Hobson v. Hobson** (CCA 5), 221 F. 2d 839; **International Union of Electrical, Radio & Machine Workers, CIO, et al. v. United Electrical, Radio and Machine Workers of America et al.**, 192 F. 2d 847.

In addition, it has been held that an affidavit filed in support of a motion of this type is fatally defective if

the said affidavit does not list the names of the witnesses who allegedly live in other States or Districts, and does not state the nature and materiality of their proposed testimony. **Strypek v. Schreyer et al.** (District Court of New York), 118 F. Sup. 918; **Goodman v. Southern Railway Co.** (U. S. D. Ct., N. Y.), 99 F. Supp. 852.

Affidavits of the defendant's attorneys were filed in support of defendant's motion to transfer said causes, and said affidavits were identical in all these cases. Said affidavits did not name the witnesses or state what the witnesses in Indiana would testify to, but merely asserted that there were sixteen witnesses who resided in Indiana and who would "likely be called upon to testify" (Appellant's App. below, pp. 33a, 34a).

Here we have a case where all of the plaintiffs, four in number, reside in Tennessee; the defendant is an Alabama corporation; where there are only two surviving eye witnesses, one of whom lived in Tennessee and the other in Alabama; nevertheless, the defendant was insisting that the case be removed to the State of Indiana. It is submitted that it would have been a great hardship upon the Tennessee plaintiffs to have caused them to go to the expense and great inconvenience of trying these cases in the State of Indiana.

## There Was No Conflict With the Decisions of the Seventh and Fourth Circuits.

The petitioner contends that the decision of the Circuit Court of Appeals for the Sixth Circuit in these cases was in conflict with the decision of the United States Court of Appeals for the Seventh Circuit, in the case of **Chicago, Rock Island and Pacific Railroad Co. v. Igoe**, supra, and the decision of the United States Court of Appeals for the Fourth Circuit, in the case of **Southern Railway Company v. Madden**, supra.

In the first place, it is respectfully contended that questions involving the exercise of a sound discretion of the

trial court, must each be considered in the light of the exact facts and circumstances existing in that particular case, and, therefore, could hardly be considered as being in conflict with the decisions of another Circuit, involving different facts and different circumstances. To further illustrate our contention in this respect, we point out that the facts involved in the decision of the Seventh Circuit Court of Appeals, and the facts involved in the decision of the Fourth Circuit Court of Appeals, are vastly different from those involved in the three causes *sub judice*.

In the case of **Chicago, Rock Island and Pacific Railroad Co. v. Igoe**, supra, not only did the accident occur in the State of Iowa, and all of the witnesses lived in the State of Iowa, but, in addition, the plaintiff was a resident of Iowa, and was appointed as administratrix of the estate of the deceased (it was a suit for wrongful death), by the courts of Iowa, yet, nevertheless, the suit was instituted, at the plaintiff's election, in the State of **Illinois**. In that case the question of a transfer to the Iowa court, and the refusal of the trial judge to so order a transfer from the State of Illinois to the State of Iowa, was raised in a mandamus action prior to the actual trial. The defendant made a strong showing that if the actual trial took place in Illinois that it would be compelled to go to tremendous expense to transport all the witnesses to Illinois, and, furthermore, that it might well be deprived of the testimony, in open court, of a number of witnesses because of their inability to compel them to appear in Illinois. In the cases *sub judice*, the trial has already taken place and been completed. There is no showing or contention that any material witness for the defendant refused to come to the State of Tennessee. Certainly any inconvenience or expense that is involved would be doubled by a new trial.

In the case of **Southern Railway Company v. Madden**, supra, it was shown that the plaintiff lived as near Charlotte, North Carolina, where the accident occurred and

where all but one of the witnesses resided, as he did to Columbia, South Carolina, where the action was instituted on the plaintiff's choice. The Court pointed out at some length that the only party's convenience that was served by having the case brought in Columbia, South Carolina, was the attorney for the plaintiff. Furthermore, in that case it appeared that a view of the *locus in quo* would be of importance in trying the case. But, in the cases involved in this petition, it is undisputed that the accident occurred on a perfectly straight stretch of road, and that the view was unobstructed for a long distance in each direction. It is inconceivable that either party, in these cases, would have requested, or if either party had requested, that the Court would have granted a motion to permit the jurors to inspect the scene of the accident, which, in any event, would have been some distance from the Indiana court, where the cases would have been tried.

**The Decision of the Court of Appeals For the Sixth Circuit Is Not in Conflict With Applicable Decisions of This Court.**

We see nothing whatsoever inconsistent between the statements of Mr. Justice Minton in the case of **Norwood v. Kirkpatrick**, supra, or that of Mr. Justice Jackson in **Gulf Oil Corporation v. Gilbert**, supra, and the factors obviously given consideration by the trial judge in these cases under consideration, in exercising his discretion as the trial judge. Mr. Justice Minton summed up the holdings in both of those cases by the following statement:

> "This is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader."

In the first place, in the cases involved in this petition, the plaintiffs did not leave the State of their residence and seek a foreign forum. The suits were instituted in the States in which they resided.

In the second place, the defendant's petition is based upon the erroneous assumption that the trial judge found, upon considering all of the circumstances and facts, that the balance of convenience of the parties and the witnesses strongly favored Indiana as a situs of the actual trial, but that this strong balance of convenience was nullified merely because the plaintiffs elected to sue in the State of Tennessee. That is not correct. The Court found that the balance of convenience was "substantially equal," as shown by the following statement of the trial court (Appellant's Appendix below, p. 63a):

> "On the whole, it appears to the Court that balancing the factor of the number of witnesses involved, the witnesses from Indiana and the witnesses from Tennessee, that probably the matter is substantially equal, the inconvenience would be substantially equal: . . .
>
> * * * * * * *
>
> "So on the whole case, balancing all the factors involved and considering all of them, the Court feels that there has not been a sufficient showing made to cause the Court to exercise its discretion to transfer the case from this court to the federal court in Indiana:"

Primarily, the purpose of transferring the trial of a case to another jurisdiction is for the convenience of the witnesses and the parties, to eliminate excessive expenses and to avoid the possibility that a party may be deprived of having a witness in open court because of the unwillingness of a witness to appear in another jurisdiction. These three cases have already been tried. The record shows that it was a lengthy case involving a number of days. There is no suggestion or contention that the defendant was deprived of having in open court, in Tennessee, any material witness. In fact, the record shows that apparently the defendant had no difficulty in bringing to the State of Tennessee the witnesses it desired to introduce at the trial. To require that these matters be

tried a second time, in the State of Indiana, would serve no convenience to any party or any witness, and serve to save no expense to any party, but, on the other hand, it would only serve to double the inconvenience and expense of all concerned.

## CONCLUSION.

It is respectfully contended that the question submitted by the petition for certiorari was a matter for the exercise of sound discretion by the trial judge, that the trial judge's exercise of that discretion was obviously sound, and that the Court of Appeals for the Sixth Circuit did not err in affirming his action in that respect. Certainly it could not be contended that it clearly appears from this record that the trial court abused its discretion in this respect. No legal question is really involved here. To grant this certiorari would be to open the doors to thousands and thousands of cases involving a Trial Court's exercise of discretion upon thousands and thousands of different combinations of different facts and circumstances existing in each case.

It is therefore, the contention of Respondents that the petition for certiorari is without merit and should be denied.

Respectfully submitted,

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